IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 434.

CAPITAL TRANSIT COMPANY, A Corporation, *Petitioner*,

v.

JULIA S. JACKSON, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Failure to Produce Available Evidence.

The plaintiff below testified that she did not know how the collision occurred, but on the other hand she actually produced the operator of the street car and the operator of the laundry truck involved in the collision in question and interrogated each of them to the extent that they were the operators of the vehicles involved and that they were on duty for their respective employers at the time of the collision. But she absolutely failed and refused to interrogate them with respect to the negligence involved (R. 5, 6) This is not a case where the plaintiff below was injured through some means about which she ordinarily would not

or possibly could not know. In other words, there was no failure in the means of transportation, such as, for instance, a wheel coming off of a street car, or a street car itself being derailed, or a short circuit, or a fire happening to the street car itself. The true cause of the collision did not lie solely within the knowledge of Petitioner, and unless the circumstances of the particular case do not suggest or indicate superior knowledge or opportunity for explanation on the part of the party charged, or if the plaintiff himself has equal or superior means of information, then it *was* encumbent upon the plaintiff below to produce testimony of the negligence charged; and it is submitted that where a party fails to present evidence within his power to produce, the presumption is that the evidence, if offered, would be unfavorable.

Chesapeake Beach Railway Co. v. *Brez*, 39 App. D. C. 58.
MacConnell v. *Wood*, 47 App. D. C. 424.
Alexander v. *Blackman*, 26 App. D. C. 541.
Evans v. *Bell*, 49 App. D. C. 238, 63 Fed. 634.

Res Ipsa Loquitur.

It is therefore clear that under such circumstances the doctrine of res ipso loquitur does not apply, nor does the burden of the evidence shift.

As is said in the case of *Mead* v. *Missouri Water Etc. Co.* (Mo.), 300 S. W. 515-518, "Since the rule (of res ipsa loquitur) is one founded upon reason arising out of necessity, or inability of the injured party to show the specific negligence of the party charged, the reason for the rule must be found in the particular case as a pre-requisite to enforcement of the rule in that case."

And, where the testimony in plaintiff's case shows him to be possessed of material but undisclosed evidence as to the circumstances of the accident in which he was injured, mere proof by him of the occurrenec does not raise a presumption which the defendant can be called upon to rebut.

Levendusky v. *Empire Rubber Mfg. Co.*, 84 N. J. L. 698, 87 A. 338.
Bahr v. *Lombard*, 53 N. J. L. 233, 21 A. 190.

While a few jurisdictions seem to hold to the contrary, yet the great majority of the decisions is to the effect that the doctrine does not apply where the plaintiff is a passenger in a street car and a collision occurs between it and another vehicle over which the street car company has no control.

For instance, in Illinois it is generally held that the doctrine of res ipsa loquitur does not apply to an injury to a passenger in a collision where the other vehicle is not under the carrier's control.

Chicago City R. Co. v. *Rood*, 163 Ill. 477.
Chicago Union Traction Co. v. *Mee*, 218 Ill. 9.
Barnes v. *Danville Street R. & L. Co.*, 235 Ill. 566.
North Chicago Street R. Co. v. *O'Donnell*, 115 Ill. App. 110.
Loehner v. *North Chicago Street R. Co.*, 116 Ill. App. 365.
Asher v. *East St. Louis and Suburban R. Co.*, 140 Ill. App. 220.

In the Rood case above cited the Court says:

> "The question presented for our consideration is whether, in case of the happening of an accident to a passenger upon a street car, the two concurrent facts of the accident and the exercise of ordinary care by the injured party raise the presumption of negligence against the carrier, so as to shift the burden of proof upon it to show that it was not guilty of negligence. The weight of authority seems to be in favor of the position that the mere happening of the accident, together with the exercise of ordinary care by the plaintiff, does not alone raise the presumption of negligence on the part of the defendant carrier."

In the case of *Union Traction Company* v. *Mann*, 72 Indiana App. 50, the doctrine of res ipso loquitur was held

inapplicable because of the want of control of the carrier over the other vehicle.

And, in Pennsylvania such doctrine is likewise held not to apply to collisions in which the other vehicle is not within the carrier's control.

> *Federal Street and P. Valley R. Co.* v. *Gibson*, 96 Pa. 83.
> *Kurts* v. *Philadelphia Rapid Transit Co.*, 244 Pa. 179.

The general rule that proof of the relation of carrier and passenger existed, that the accident happened, and that the injury was inflicted, shifts the burden of proof to the carrier has a well-defined exception, namely, that where the proximate cause of the injury, at least in part, was the act of a third person over whom the carrier had no control, the presumption of negligence from the happening of the accident does not arise, but the duty of proving the negligence of the carrier rests upon the passenger.

> *Lochner* v. *North Chicago Street R. Co.*, 116 Ill. App. 365.

The doctrine of res ipsa loquitur was held not applicable in *Stangy* v. *Boston Elev. R. Co.*, 220 Massachusetts 414. In this case the Court said:

> "The injury to the plaintiff resulted from a collision between the car in which he was travelling and a coal wagon. But there is nothing to indicate by whose fault this was caused. The car of the defendant was upon a public street and was not in a location devoted exclusively to its uses. The mere fact of a collision between travelers on a public way without more is not enough to fasten negligence upon either. * * *. Whether the defendant or the persons in charge of the coal team were negligent is left wholly to conjecture. * * *. The case at bar is not within the doctrine of res ipsa loquitur, which oftentimes is enough to support a finding of negligence on the part of a common carrier."

To the same effect is *Sandler* v. *Boston Elev. R. Co.*, 238 Massachusetts 148.

In the case of *Yellow Cab Company* v. *Hodgson* (Colorado), 14 Pacific (2d) 1081, it is held that the doctrine of res ipsa loquitur is inapplicable to establish negligence on the part of the driver of a taxicab toward a passenger injured in a collision with another vehicle the driver of which is also charged with negligence when it appears that the injury may have resulted from the concurrent negligence of both. In the course of its opinion the Court says:

> "In 8 Encyclopedia of Evidence, 872 et seq., it is said: 'That a presumption of negligence may arise from the very nature of the efficient cause of the damage, certain conditions precedent must occur as follows: First, the immediate cause of the accident must clearly appear to be under the control of the defendant, * * *: Second, there must be no other equally proximate, apparent cause of the accident besides that for which defendant is responsible. So where the acts or omissions of two or more independent persons are apparently equally immediate causes of an injury, the negligence of neither of such persons can be presumed * * *.'
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> "In 1 Shearman & Redfield on the Law of Negligence (6th Ed.) 131, it is said, with reference to the doctrine of res ipsa loquitur: 'Certain conditions must concur. The causative force of the injury must be shown to be controlled by the defendant; it must also appear that there was no equally efficient proximate cause. If from the nature of the event causing the injury an inquiry naturally arises which one of two or more persons, acting independently, is responsible; or if it appear that the injury was proximately caused by the independent acts of two or more persons, the application of the maxim is excluded by its terms.' * * *
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> "Where the respective agencies which cause a collision are not both within the control of defendant carrier, a presumption of negligence does not arise. 10 C. J. 1033.
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> "Where either one or two defendants wholly independent of each other may be responsible for the injury

complained of, the rule of res ipsa loquitur, in accordance with the preceding principles, cannot be applied. 45 C. J. 1214." • • •

This same position is stated in 38 American Jurisprudence, Page 997, where it is said:

"If it appears that two or more instrumentalities, only one of which was under the defendant's control, contributed to or may have contributed to the injury, the doctrine (res ipsa loquitur) cannot be invoked." Citing cases.

In the case of *Pistorio* v. *Washington Railway and Electric Company*, 46 App. D. C. 479, the plaintiff sought to recover damages for personal injuries while she was a passenger on one of the defendant Railway Company's cars. The accident was the result of a collision between the car and an automobile owned by the co-defendant. Plaintiff requested the following Prayer which was refused:

"The Court instructs the jury that a passenger is entitled to the highest degree of care, diligence, skill, and caution on the part of the carrier or street railway company, and if the jury believes from the evidence that the defendant operated the railroad mentioned in the declaration and accepted the plaintiff as a passenger, then the defendant was bound to exercise for the plaintiff's safety the highest degree of care, diligence, and skill practicable under all the circumstances, and exercise reasonable foresight, and to use the utmost care and diligence to prevent a collision and for the protection of the plaintiff from injury while she was traveling as a passenger on the defendant's car; and if you find that the defendant failed in any of these respects and that such failure was a contributing cause to the accident then your verdict should be in favor of the plaintiff." • • •

"The Court charged the jury that the action was brought against the joint defendants 'on the theory that the two were both negligent in bringing about this collision, and the plaintiff appears to have been a passenger upon the car, and the relation between her and

the railway company by reason of her being a passenger is different from her relation to the other defendant Walker, because he had not undertaken to carry her as a passenger, whereas the railway company had. The railway company was bound to exercise all the care and skill and foresight within reason in carrying her safely. The defendant Walker was bound to exercise reasonable care in the management of his car so as not to run into the street car and injure people who might be riding therein.'" * * *

"Exception is taken to the refusal of the court to grant a prayer imposing upon both defendants the burden of proving by a preponderance of the evidence that they were free from negligence, on the theory that the law raises a presumption of negligence in this case from the mere happening of the accident. The Court, over objection, granted prayers offered by counsel for defendant railway company to the effect that in this case no presumption of negligence arose from the mere happening of the accident, and that the burden of proof was upon plaintiff to establish not only that the railway company was negligent, but that its negligence contributed to the injury of plaintiff." * * *

"While no instruction as to an inference arising from the happening of the accident was called for or would have been proper in this case, the voice of the prayer requested consists not only in shifting the burden of proof but in failing to state the effect to be given by the Jury to such an inference when unexplained by the defendant."

In other words, the *Pistorio case* clearly says that the doctrine of res ipsa loquitur does not apply and would not be proper in favor of the plaintiff who was a passenger in a street car and was injured as the result of a collision between the street car and an automobile owned by the co-defendant. And, in affirming the judgment for the defendants, the Court said in this case that an examination of the record disclosed no error in the application of the law to the case made by the plaintiff even though the negligence of the defendants was charged generally. And it is to be

noted that the plaintiff in the instant case charged negligence generally as to petitioner.

The Rule of Res Ipsa Loquitur is always applied with caution, and only where there is an absence of positive proof of any definite act of negligence or want of skill, even though the accident itself is of an unusual and extraordinary character and one not likely to occur without such cause.

Kight v. *Metropolitan R. Co.*, 21 App. D. C. 494.

Before the Rule of Res Ipsa Loquitur can be applied, a condition must be found existing which presupposes negligence on the part of the person sought to be charged.

Jacquette v. *Capital Traction Company*, 34 App. D. C. 41.

The doctrine of res ipsa loquitur may be invoked only where the facts of the occurrence warrant the inference of negligence, and the pleader because of the nature of the case, is unable to point out the specific acts which caused the injury.

King v. *Davis*, 54 App. D. C. 239, 296 F. 986.

Inasmuch as the plaintiff below had it within her power to inform the jury and the trial court of the facts of the occurrence, and could have shown the cause of the collision in question, and refused to do so, it is submitted that the doctrine of res ipsa loquitur does not apply.

Conclusion.

It is therefore respectfully submitted that this Petition for a writ of certiorari should be granted.

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